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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

A. A. HOEHLING,

Petitioner,

vs.

UNIVERSAL CITY STUDIOS, INC., and
MICHAEL MACDONALD MOONEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT MICHAEL M. MOONEY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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In The

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A. A. HOEHLING,

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BRIEF FOR RESPONDENT MICHAEL M. MOONEY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Second Circuit Court of Appeals correctly rule that ideas, theories, and historical facts and research per se are not capable of copyright protection?

2. Did the Second Circuit Court of Appeals correctly rule that Federal law preempts state law protection of those elements of petitioner's book which are non-copyrightable and in the public domain?

COUNTERSTATEMENT OF THE CASE [1]

The Genesis Of This Suit

Petitioner's "chronicle" and "documentary" (P.Bk. at xiv, 19), titled "Who Destroyed The Hindenburg?", appeared in 1962 and thereafter went out of print. JA 258, 736. Mooney's book "The Hindenburg" was published ten years later, in 1972. JA 25. Petitioner claimed "plagiarism" before reading Mooney's book, which was more successful than his.[2] JA 754, 1071, 1074. After he read the book, however, petitioner wrote to his publisher that "It's a different book;" noting that Mooney "went to Germany, I have established . . ., and talked with most of the people I did," petitioner concluded that apart from his "pique," "the case is closed." JA 1041.

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[1] Citations herein to the Joint Appendix and Supplementary Appendix below are in the form "JA" and "SA." Citations to the opinions of the District Court (unreported) and the Court of Appeals (reported at 618 F.2d 972), which appear in the appendix to the Petition, are in the form "App." Petitioner's book is cited "P.Bk.", and Mooney's "M.Bk." We do not deal here with the facts concerning respondent Universal City Studios, Inc. ("Universal"); those are covered in Universal's Brief in Opposition, cited herein as "U.Br."

[2] As petitioner's agent wrote to him at the time: "I don't blame you for being burned up because someone else's Hindenburg story is outselling the one you did. That is human nature. . . . Walter Lord was certainly not the first man to write about the Titanic, and I'm sure the previous authors felt hurt when his book outsold theirs." JA 1074.

Two years later, petitioner discerned "considerable financial interest" in respondent Universal's rumored film about the Hindenburg. JA 1070. In late 1975 petitioner sued Universal (JA 15)—having decided to assert that his book was really "fiction," since "[o]therwise, I'd have no claim." JA 1076. Thereafter the suit was transferred to the Southern District of New York (after an attempt to add Mooney as a defendant failed for want of personal jurisdiction) and Mooney was joined. JA 23, 73-74.

The Proceedings And Rulings Below

Discovery ensued. After petitioner's efforts to obstruct discovery on (among others) the "fiction" issue led to an award of costs against him, JA 1055, 1057, 1061-62, petitioner finally admitted that his book was factually accurate, that he intended readers to rely on it as such, and that most of his specific "copying" claims concerned historical facts available from other sources. JA 743, 751, 823-25. It also developed that petitioner's general historical theory—that the Hindenburg may have been sabotaged by:

> ". . . the rigger, Eric Spehl, [who,] influenced by his romance with a woman . . . who had anti-Nazi connections, developed a special type of bomb and placed it against the gas cell number 4 in the Hindenburg" (JA 274)—

was not particularly new. The theory of a bomb planted by a crew member is concededly old hat. JA 775; see ROSENDAHL, WHAT ABOUT THE AIRSHIP? (1938) 21, 24-26, pointing out that a bomb roughly the size of "an ordinary fountain pen" could be made "relatively simpl[y]," and "would have been hard to detect" if "suspended in a gas-cell trunk"—of necessity Cell 4,

where the fire began. SA 81.[3] Spehl and his girlfriend were hardly unknown. The woman was under suspicion from the first; both she and Spehl were the subject of Gestapo investigation at the time; and "[b]y the end of 1937" Spehl's guilt was a common "rumor" in the Hindenburg family, a "suspicion . . . in discussion" during 1938 and "living obstinately till nowadays." JA 171-73.[4]

Mooney and Universal moved for summary judgment, which the District Court granted on the ground that (a) "Copyright does not protect ideas, theories, or broad outlines" (JA 77-78), so that petitioner's Spehl theory was not protectible, and (b) petitioner's specific "copying" charges on their face involved either items which were "in no way similar" or references to historical facts and stock literary devices not copyrightable as a matter of law (JA 81-83). The Court of Appeals affirmed.

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[3] So with the flashbulb/dry cell elements of the bomb (see Petition at 8). Spehl was a photography buff; it is well known that the elements of a dry cell battery were found in the Hindenburg's wreckage (see Hoehling Dep., 4/26/77, Ex. 30B); and the destructive potential of flashbulbs aboard a hydrogen dirigible was common knowledge. Hoehling Dep. (1979), p. 1240. The Kathie Rauch letter (see Petition at 8) was alike no secret, SA 13-15, and the Heldenkeller (Petition at 8) was a real place, described to petitioner by crew member Lau. Hoehling Dep., 7/21/77, pp. 269-70.

[4] This was the testimony of crew member Lau, introduced by petitioner. Rosendahl also heard the Spehl rumors, SA 9-11, and petitioner conceded that he himself did not fix upon the Spehl theory until after Klaus Pruss (the son of a crew member) wrote him suggesting that the ship was blown up because it was considered "propaganda means of Hitler's Germany" and that Spehl's girlfriend "gave him a parcel containing the infernal machine," which Spehl then "hid . . . near the upper catwalk where actually the first fire was seen". JA 745-50; Hoehling Dep., 4/26/77, Ex. 110-C; Hoehling Dep. (1979), pp. 1239-40, 1242-44.

Pointing out that "it is clear that [petitioner and respondents] relate the story of the Hindenburg differently," App. A-15, the Court of Appeals reiterated the settled principle that "an interpretation of an historical event . . . [is] not copyrightable as a matter of law" (App. A-12) and held, as to petitioner's Spehl theory, that (App. A-12 to A-13):

> ". . . the hypothesis that Eric Spehl destroyed the Hindenburg is based entirely on the interpretation of historical facts, including Spehl's life, his girlfriend's anti-Nazi connections, the explosion's origin in Gas Cell 4, Spehl's duty station, discovery of a dry-cell battery among the wreckage, and rumors about Spehl's involvement dating from a 1938 Gestapo investigation. Such an historical interpretation, whether or not it originated with Mr. Hoehling, is not protected by his copyright and can be freely used by subsequent authors."

As to petitioner's specific "copying" charges, the Court of Appeals observed that "many of [petitioner's copying] allegations are patently frivolous," that "[t]he vast majority of the remainder deals with alleged copying of historical facts," and that the balance reflected "random duplications of phrases and sequences of events" or "*scenes a faire*, that is, 'incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.'" App. A-13 n.6, A-14. These, therefore, were not capable of copyright protection. "[S]tandard literary devices" and *scenes a faire* "are not copyrightable as a matter of law," App. A-14 to A-15; and "factual information is in the public domain," so that each respondent "had the right to 'avail himself of the facts contained' in [petitioner's] book and to 'use such information, whether correct or incorrect, in his own literary work.'" App. A-13.

Finally, the Court of Appeals held that in view of the copyright laws' commitment of ideas, historical theories, and facts to the public domain, state or common law protection of those elements under the rubric of "unfair competition" was precluded. "Where, as here, historical facts, themes, and research have been deliberately exempted from the scope of copyright protection to vindicate the overriding goal of encouraging contributions to recorded knowledge, the states are preempted from removing such material from the public domain." App. A-16.

The Two Books And Petitioner's "Copying" Claims

As the courts below held (see App. A-10, A-13 to A-14), since the subject matter of petitioner's claims is non-copyrightable in any event, it is not necessary to engage in extended analysis of petitioner's "copying" accusations. But some salient points should be briefly noted to correct inaccuracies and omissions in the Petition.

The Books. Save that both deal with the last voyage and crash of the Hindenburg and with the Spehl theory, petitioner's and Mooney's books are not greatly akin. Petitioner's 225-page text is divided into two segments. The first segment (142 pages, nearly two-thirds of the book) is a "factual account, written in an objective, reportorial style," of "the final crossing of the Hindenburg, from Sunday May 2, [1937,] when it left Frankfurt, to Thursday, May 6, when it exploded at Lakehurst." App. A-5. Spehl is mentioned only four times (see P.Bk. at 240). The second segment of the book—"The Quest," pp. 143-225—begins with a 31-page factual report of post-crash events. Then the scene shifts to a 33-page account (P.Bk. at 181-213) of petitioner's in-

terviews. A final 11-page chapter tentatively broaches the Spehl sabotage theory, framed by suggestive questions rather than positive assertions.[5]

While petitioner calls his book a "historical whodunit," JA 729-30, Mooney's 268-page book—which begins with an epigraph from Hobbes' "Leviathan" and throughout "attempt[s] to weave a number of symbolic themes through the actual events" (App. A-6; see JA 350-54)—*assumes* the "who" and concentrates on the "why," playing out the Hindenburg tragedy along more or less allegorical lines. Unlike petitioner, Mooney begins not with the Hindenburg's last voyage but with zeppelins as technological *"dei ex machina"*—as (again from Hobbes) "Automata . . . [that] have an artificiall life"—subject to "the Iron Law of Technology." M.Bk. at 13, 24-25, 35, 51, 64; see generally Chs. 1, 2. Mooney's Hindenburg does not take off until page 138, more than halfway through; and thereafter there is no mystery about the bomb. On the next page we know it is aboard and what it looks like, and by page 216 we have been told outright that Spehl planted it. See App. A-6.

The "Copying" Claims. Petitioner concluded in 1972 that Mooney's was "a different book" from his. JA 1040. It is apparent—and petitioner admits (JA 705-08, 773)—that the two books differ in "overall feel," "style," and "treatment." Petitioner also admitted that, as one might expect from these differences, the great bulk of his "copying" claims concerned only historical facts

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[5] Apart from the last four pages of the book (when we are given a sketchy outline of his background and motivations), even in the second segment of petitioner's book Spehl is not mentioned save for a brief reference to his nightmares (P.Bk. at 201-02) and two hints of mystery (*e.g.*, p. 150: "But Spehl? No one seemed to know Eric Spehl"). See P.Bk. at 240.

available from a variety of sources. JA 823-25; see App. A-13 n.6, A-14, A-20 to A-22.[6]

This was borne out by petitioner's list of "copying" claims (filed separately as "Exhibit AA" in the Court of Appeals). Both courts below found petitioner's claims without substance on their face, and in large part "patently frivolous." App. A-13 n.6, A-14, A-20 to A-22. Fully 232 of petitioner's 265 claims concerned the first, purely factual segment of petitioner's book, almost wholly devoid of anything other than bald historical reportage about the Hindenburg's last flight; as petitioner acknowledged, these claims largely involved the appearance of the same historical facts in both books.[7]

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[6] While it is not of great significance (since historical facts are in the public domain), we must point out that Mooney did *not*, as claimed in the Petition (*e.g.*, pp. 11, 15, 38, 39), "admit" copying "much of [petitioner's] material . . . into his book;" nor was there any such "proof." Mooney read petitioner's book (he credited it as a source in his own work: M.Bk. at 276), took notes on it, and drew (or verified) some details from it—for example, the name of the Heldenkeller. As would any researcher's, his notes (JA 384-433) bore a resemblance to petitioner's book, though they also contain other material. See JA 549-63. It is these *notes*, or an early *outline*, from which all the examples and so-called "admissions" at pages 11-16 of the Petition were drawn. It is not disputed that Mooney spent some six months researching his book (including three months of interviews, both here and in Germany) and amassed several thousand pages of research notes, National Archives material, news clippings and articles, and the like; some 2,000 pages of these materials were produced at Mooney's deposition. JA 165-66, 169, 571-608, 618-39, 776-77, 843-48, 1040.

[7] The Court of Appeals noted ten examples of this sort of thing. App. A-13 n.6. One might mention in addition such things as references to the properties of hydrogen ("Ex. AA," item 5), the bombing of Guernica (item 137), the phrases "Gruss Gott" and "Heil Hitler" (item 7; see App. A-14), and the Horst Wessel Song (item 103; see App. A-14, A-21 to A-22).

Nearly half the claims concerned but 26 pages of Mooney's book, including his description of the Hindenburg's passengers—real persons, as to many of whom Mooney's information is more detailed than petitioner's.[8] Many of the claims were "comparisons" of contrary facts, or facts used by the two writers in wholly different contexts, or facts not found in petitioner's book.[9] And petitioner's list of claims tangibly demonstrated the different organization and treatment of the two books. It went sequentially through Mooney's book, but jumped haphazardly through petitioner's in order to find "similarities."[10]

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[8] See "Exhibit AA," items 55-84, 96-112, 119-29, 179-247. For example, items 80-81 and 116 accuse Mooney of "copying" facts about Joseph Spah. But it is undisputed that Mooney interviewed Spah, and that petitioner did not. Among other things, Mooney (but not petitioner) uses the correct name of Spah's dog. Petitioner admitted that he borrowed the incorrect name he uses from another writer's book. JA 776-77, 848, 853-54.

[9] For example, item 4 "compared" petitioner's reference to an aluminum piano aboard the Hindenburg to Mooney's explanation of why the piano was *not*, in fact, on board. See JA 856, 858. Item 17 compared petitioner's vague reference to "ranking Nazis on board" with Mooney's specific identification—accurate (JA 176) and nowhere found in petitioner's book—of Lau as a Nazi Party and SS member, complete with serial numbers. JA 726-28, 738-39, 847-48, 852. So with the "comparison" given at page 21 of the Petition: petitioner says Clemens "had no flash bulbs," while Mooney notes that in fact his flashbulbs were confiscated.

[10] For example, items 46 through 52, drawn in sequence from M.Bk. at 117-18, were alleged to infringe *in this order* P.Bk. at 165, 11, 61-62, 8, 90, frontispiece, and 63. This disjointed pattern was recurrent; see, *e.g.*, items 85-89, 128-132, 141-153, 176-182.

REASONS FOR DENYING THE WRIT

Just as the Petition frequently garbles the facts, its argument has little to do with the holdings of the courts below. Much of the Petition is simply beside the point. For example, its "fair use" argument (*Pet.* at 39-41) has no bearing here, because the "fair use" doctrine does not even come into play unless it has been determined that the material involved *was copyrightable*. See, *e.g.*, *Gardner v. Nizer*, 391 F.Supp. 940, 943-44 (S.D.N.Y. 1975). The "fair use" doctrine creates a "privilege in others to use *the copyrighted material*" under some circumstances. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), quoting BALL, COPYRIGHT AND LITERARY PROPERTY (1944) 260. Here the courts below held that the material on which petitioner's claims rest was *not* copyrightable. "Fair use" has nothing to do with it.

Similarly, petitioner's claims that the courts below improperly adjudicated factual issues of copying or "fair use" (*Pet.* at 45-47), or "convert[ed] a factual defense" of noncopying into a "legal defense" (*Pet.* at 33-35, 35-39), simply miss the point. The courts below did no such thing. To the contrary, and despite the largely frivolous nature of petitioner's copying claims (see pages 5, 8-9, *supra*), they *assumed* copying for purposes of their decisions. They held that even so, petitioner could not make out a valid claim *because the material involved was not copyrightable*. The Court of Appeals was explicit (App. A-10, A-15):

> ". . . [The District Court] assumed both copying and substantial similarity, but concluded that all similarities pertained to various categories of non-

> copyrightable material. Accordingly, he granted appellees' motion for summary judgment. We affirm the judgment of the district court.
>
> "* * *
>
> "All of [petitioner's] allegations of copying, therefore, encompass material that is non-copyrightable as a matter of law, rendering summary judgment entirely appropriate."[11]

Hence the real (and only) issue is whether the subject matter of petitioner's claims—ideas, theories, and historical facts (App. A-11 to A-15, A-18, A-20 to A-22)—is protectible. Relying on more than a half century of settled law, both courts below held that material not protectible. Both courts were clearly correct.

I.

IDEAS, THEORIES, AND HISTORICAL FACTS ARE NOT COPYRIGHTABLE. THIS HAS LONG BEEN SETTLED LAW, AND THERE IS NO CONFLICT AMONG THE CIRCUITS.

Both the purpose of copyright protection under Article I, § 1, cl. 8 of the Constitution and the policy of the Copyright Act, 17 U.S.C. § 101 *et seq.*, has always been to encourage—not restrict—growth in the stock of

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[11] While this renders petitioner's "factual adjudication" argument irrelevant *ab initio*, we also note that there is no magic quality to charges of copying or substantial similarity which as a matter of law bars their adjudication on a properly supported motion for summary judgment. The "slightest doubt" test of *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), was abandoned sixteen years ago, *Dressler v. M/V Sandpiper*, 331 F.2d 130 (2d Cir. 1964), "leaving cases like *Arnstein* as mere momentos of law gone by." 6 J. MOORE, FEDERAL PRACTICE (2d Ed. 1980), ¶ 56.17[14]. We adopt Universal's argument on this point. U.Br. at 20-21. Even the *Arnstein* test could not prevent a court from (App. A-13 n.6) rejecting "patently frivolous" claims.

knowledge and ideas. *Eichel v. Marcin*, 214 F. 404, 410 (S.D.N.Y. 1913); *Midas Productions, Inc. v. Baer*, 437 F.Supp. 1388, 1390-91 (C.D. Cal. 1977). Even the "financial reward guaranteed to the copyright holder is but an incident of this general objective," *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543-44 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). In achieving this goal, it is fundamental that "protection is given only to the expression of the idea—not the idea itself," *Mazer v. Stein*, 347 U.S. 201, 217 (1954). Hence, as Congress has recently reminded us, like its predecessor the 1976 Copyright Act:

> ". . . *does not preclude others from using the ideas or information revealed by the author's work.* It pertains to the literary, musical, graphic, or artistic *form* in which the author expressed intellectual concepts. . . . [*C*]*opyright protection does not extend to any idea . . ., concept, principle, or discovery,* regardless of the form in which it is described, explained, illustrated, or embodied in such work." [Emphasis added.]

H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) at 56-57, 5 U.S. CODE CONG. & ADM. NEWS (1976) 5659, 5670. The courts below precisely followed—and petitioner's claims directly contravene—these fundamental principles.

A. Ideas And Theories Cannot Be Copyrighted.

Time and again this Court and other courts have applied the basic principle that ideas as such—particularly historical ideas and theories—are not protectible. "The familiar test of copyrightability distinguishes between the 'ideas' used by the author and his 'expression' of them. Only the latter is said to be copyrightable. *Holmes v. Hurst*, 174 U.S. 82, 86, 19 S.Ct.

606, 43 L.Ed. 904 (1899)." *Burnett v. Lambino*, 204 F.Supp. 327, 330 (S.D.N.Y. 1962). "An author may have no monopoly upon any theory propounded by him, or in the speculations by which he has supported it, nor even in the use of the published results of his own observation. *Baker v. Selden*, 101 U.S. 99 [, 102-04 (1879)]; *Bauer v. O'Donnell*, 229 U.S 1 [, 13-15 (1913)]." *Eichel v. Marcin*, 241 F. 404, 410-11 (S.D.N.Y. 1913). "In the literary field this rule means that themes and plots are not protected. *Shipman v. RKO Pictures*, 100 F.2d 533, 538 (2d Cir. 1938)." *Midas Productions, Inc. v. Baer*, 437 F.Supp. 1388, 1390 (C.D. Cal. 1977). See *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Musto v. Meyer*, 434 F.Supp. 32, 36 (S.D.N.Y. 1977), *aff'd without op.*, 598 F.2d 609 (2d Cir. 1979).

Here petitioner, both in the courts below (see JA 284, SA 25) and in this Court (*Pet.* at 3), complains that respondents used his "literary idea and concept" or his "historical interpretation," in the form of the Spehl theory. That is the centerpiece of his claim; he concedes that Mooney wrote "a different book" from his, JA 1040, unlike his in "overall feel" (see *Reyher v. Children's Television Workshop*, 533 F.2d 87, 92 (2d Cir. 1976)), "style," and "treatment." But as the Court of Appeals observed, App. A-12 to A-13 (quoted at page 5, *supra*), the Spehl theory "is based entirely on the interpretation of historical facts." Petitioner cannot copyright either those historical facts, *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938), or the ideas, interpretations, or inferences to which they give rise. *Greenbie v. Noble*, 151 F.Supp. 45, 50, 71 (S.D.N.Y. 1957) ("reasonable inferences . . . from historical events"); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577-78 n.13 (1977) ("ideas" and "concepts"); *Eichel v. Marcin*, 241 F. 404, 410-11 (S.D.N.Y. 1913).

Spehl, his girlfriend, their anti-Nazi connections, and the other elements of petitioner's theory are history. See pages 3-4, *supra*. The inference to which those facts give rise is not petitioner's alone; both the Gestapo and the Hindenburg's crew harbored similar suspicions. See pages 3-4, *supra*.[12] The "sabotage-by-Spehl" idea itself was given to plaintiff by Klaus Pruss. See page 4, n.4, *supra*. But even if petitioner had lucubrated these things on his own, they cannot form the basis for an infringement claim. To hold otherwise would not only overturn basic and long-settled principles of copyright law, but also (as the Court of Appeals observed, App. A-2 to A-3, A-12, A-15 to A-16) risk chilling and retarding the progress of historical writing. That would be directly contrary to the purposes of copyright protection. *Eichel v. Marcin*, 241 F. 404, 408-09 (S.D.N.Y. 1913); *Midas Productions, Inc. v. Baer*, 437 F.Supp. 1388, 1390-91 (C.D. Cal. 1977); *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F.Supp. 632, 638 (S.D. Cal. 1935).

B. Facts, History, And Stock Literary Devices Cannot Be Copyrighted.

Apart from the Spehl theory (dealt with above) and "many" "patently frivolous" allegations (App. A-13 n.6), the courts below found that the "vast majority" of

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[12] Years before Mooney's book was written, in fact, another author asserted that the Gestapo ultimately "narrow[ed] their investigation down to one man, rigger Eric Spehl." TITLER, WINGS OF MYSTERY 250. Titler (whose book Mooney read at the outset of his own labors, well before he encountered petitioner's: JA 507-09, 843, 845) has since said that he too obtained the Spehl theory from petitioner. But as the Court of Appeals observed, App. A-4 n.1, petitioner has never taken any action against Titler (JA 279); and Titler's reference to the Gestapo's focus on Spehl does not appear in petitioner's book.

petitioner's claims concerned either alleged copying of historical facts—which petitioner admits, JA 823-25—or "random duplications of phrases and sequences of events" and "standard literary devices," App. A-13 n.6, A-14 to A-15, A-20 to A-22.[13] As with petitioner's ideas and historical theories, it has long been settled that such things are simply not copyrightable.

To begin with, "[t]here is no copyright of facts, news or history," *Greenbie v. Noble*, 151 F.Supp. 45, 66 (S.D.N.Y. 1957), and no "monopoly in the narration of historical events," *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). As Judge Learned Hand trenchantly observed in *Myers v. Mail & Express Co.*, 36

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[13] See pages 7-9, *supra*, and page 22 n.16, *infra*. It may be noted that the list of claims on which both courts ruled was petitioner's fourth attempt. His first (stricken on motion, JA 1042-45) was riddled with wholly fictitious "comparisons" achieved by cutting and pasting unrelated passages together to create the false impression of a single passage; for example, one claim combined—without indication, and in reverse order—two passages from two pages of petitioner's book 36 pages apart. See JA 856-58. Petitioner's next attempt (of which his third was a revision) claimed 347 "similarities," of which 191 lacked any reference at all to Mooney's book even though most claimed copying of "literal expression" or "selection and arrangement of words;" petitioner admitted that he could not explain those charges. JA 812; see JA 1046-47. As to the disjointed manner in which petitioner's final attempt jumped around through his book (see page 9, *supra*), we note that "[s]imilarity may not be shown . . . by an analysis which alters the actual sequence or construction of plaintiff's work," 3 NIMMER ON COPYRIGHT (Rev. Ed. 1980), § 13.03[E][3]. And petitioner's persistent attempt to base claims on Mooney's *notes* or *outlines* (see page 8 n.6, *supra*) is both disingenuous and improper. It is the book, not notes or drafts or outlines, on which any claim must rest. *Cain v. Universal Pictures Co.*, 47 F.Supp. 1013, 1017-18 (S.D. Cal. 1942); *Fuld v. National Broadcasting Co., Inc.*, 390 F.Supp. 877, 882 n.4 (S.D.N.Y. 1975). See U.Br. at 17-18.

C.O.Bull. 478, 479 (S.D.N.Y. 1919), quoted in *Norman v. Columbia Broadcasting System, Inc.*, 333 F.Supp. 788, 796-97 (S.D.N.Y. 1971):

> "[N]ot only are all the facts recorded in a history in the public domain, but, since the narration of history must proceed chronologically,—or at least, such is the convention,—the order in which the facts are reported must be the same in the case of a second supposed author. There cannot be any such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection. . . ."

Case after case has so held. A narration of history unavoidably imposes its own rigors; "[t]he subject matter is of necessity what events have made it and the order of treatment whether that be chronological or topical is fixed by the facts." *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938). Those facts are not petitioner's property; nor may he "build a story around a historical incident and then claim exclusive right to the use of the incident." *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F.Supp. 632, 638 (S.D. Cal. 1935); *Fuld v. National Broadcasting Co., Inc.*, 390 F.Supp. 877, 881 (S.D.N.Y. 1975); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977).

And this extends as much to "stock" situations and *scenes a faire*—sequences or patterns "which necessarily must follow from the handling of similar plot situations," *Miller Brewing Co. v. Carling O'Keefe Breweries*, 452 F.Supp. 429, 439 (W.D.N.Y. 1978), or similar historical events, *Huie v. National Broadcasting Co., Inc.*, 184 F.Supp. 198, 200 (S.D.N.Y. 1960)—as it does to the historical facts themselves. Even in fiction works, such *scenes a faire* are not protectible. Yankwich, "Originality In The Law Of Intellectual Property," 11

F.R.D. 457, 462 (1951); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91-92 (2d Cir. 1976); *Cain v. Universal Pictures Co.*, 47 F.Supp. 1013, 1017 (S.D. Cal. 1942). *A fortiori* they are not protectible here, where they are dictated not only by literary convention but by the compulsion of history as well. In works describing the same historical persons or events, such similarities are "inevitable" and not actionable. *Alexander v. Irving Trust Co.*, 132 F.Supp. 364, 367 (S.D.N.Y. 1955), *aff'd per cur. on op. below*, 228 F.2d 221 (2d Cir. 1955), *cert. denied*, 350 U.S. 996 (1956); *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938). They are not the subject matter of copyright, any more than "words or phrases isolated from their context" or "usual English idioms." *Lewys v. O'Neill*, 49 F.2d 603, 611-12 (S.D.N.Y. 1931); *O'Brien v. Chappel & Co.*, 159 F.Supp. 58, 59 (S.D.N.Y. 1958).

Hence it has been repeatedly held that:

> ". . . mere similarity of phraseology does not amount to an infringement since a copyright does not protect words and phrases as such. [Citations omitted.] Moreover, similarities of incidents alone will not constitute an infringement [citations omitted], especially where both works are based on common sources and concern events in the life of an historic figure. [Citations omitted.]"

Greenbie v. Noble, 151 F.Supp. 45, 69 (S.D.N.Y. 1957). The principle is straightforward. "When a book is designed to convey information, a reader is entitled to avail himself of the facts contained therein . . . in his own literary work, provided that his expression and treatment is distinctly his own. . . ." *Id.* at 57; see *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938), and *Chautauqua School of Nursing v. National School of Nursing*, 238 F. 151, 153 (2d Cir.

1916). Thus "the copyright in a book dealing with factual matters will not be infringed by a work that copies such facts, but in a manner in which the particular verbal description of such facts is not copied," 3 NIMMER ON COPYRIGHT (Rev.Ed. 1980), § 13.03[A]; and one may freely check and correct the accuracy of one's own facts by consulting other published works on the same subject, even making corrections from the other works. 2 *Id.*, § 8.01[E].

Of course it makes no difference that the first author may (as petitioner claims here) have unearthed the fact in question through his own research. "Facts may be discovered, but they are not created by an act of authorship." 1 NIMMER ON COPYRIGHT (Rev.Ed. 1980), § 2.11[A]. Thus (*Id.*, § 2.03[E]):

> "The 'discoverer' of . . . an historical fact, a contemporary news event, or any other 'fact,' may not claim to be the 'author' of that fact. . . . The discoverer merely finds and records. He may not claim that the facts are 'original' with him, although there may be originality and hence authorship in the manner of reporting, i.e., the 'expression,' of the facts. . . . [I]t follows that quite apart from their status as 'ideas', discoveries as facts per se may not be the subject of copyright."

This is why, as Congress recently emphasized, the Copyright Act "does not preclude others from using the ideas or information revealed by the author's work," and "does not extend to any . . . discovery. . . ." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) at 56-57, 5 U.S. CODE CONG. & ADM. NEWS (1976) 5659, 5670. As the Court of Appeals below explained fourteen years ago in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009

(1967), one cannot override that "proscription against copyright of ideas and facts," nor withdraw historical events from the common store of knowledge, simply by branding one's efforts "research."

C. There Is No Conflict Among The Circuits.

We have seen that all of these principles are settled law. Petitioner's attempts to imply that they are novel (*e.g.*, *Pet.* at 24), and to establish a "conflict" between the decisions below and other cases (*Id.* at 24-30), are misplaced. Most of his supposed "conflicts" concern decisions within the Second Circuit itself, including several discussed in the Court of Appeals' opinion here; these hardly require analysis.[14] The only other Court of Appeals decisions petitioner offers are *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950), and *Bradbury v. Columbia Broadcasting System*, 287 F.2d 478 (9th Cir. 1961). But neither those decisions nor the law in their respective Circuits conflicts at all with the rulings below.

The Seventh Circuit has interpreted *Toksvig* as involving a "fair use" issue (not presented here: see page 10, *supra*). *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598, 603 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957). Certainly *Toksvig* did not hold that ideas or facts

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[14] See, *e.g.*, App. A-11 to A-12, concerning *Sheldon v. Metro-Goldwyn-Mayer Pictures Corp.*, 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936), and *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432 (2d Cir. 1940), and App. A-15, concerning *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). It may be noted that petitioner did not seek rehearing, either by the Panel or *en banc*, in the Court of Appeals.

could be copyrighted. Both in *Eisenschiml, supra,* 246 F.2d at 603, and in *Becker v. Loew's Inc.,* 133 F.2d 889, 891 (7th Cir.), *cert. denied,* 319 U.S. 772 (1943), the Seventh Circuit made it plain that, as *Becker* held, no author can "withdraw . . . ideas or conceptions from the stock of material to be used by other[s];" and *Toksvig* itself is read as reaffirming that "the facts about a historical figure are available to all to use," so long as the "expression" of the facts is not appropriated. *Sid & Marty Krofft TV Productions, Inc. v. McDonalds Corp.,* 562 F.2d 1157, 1170 (9th Cir. 1977).[15]

Petitioner's reliance on *Bradbury v. Columbia Broadcasting System,* 287 F.2d 478 (9th Cir. 1961), is equally misplaced. *Bradbury* involved a work of fiction (the novel "Fahrenheit 451"), not historical facts and theories. See App. A-11 to A-12. Like the Seventh Circuit, the Ninth Circuit has no difficulty with the established principle that historical facts, theories, and ideas are not copyrightable. *Sid & Marty Krofft TV Productions, Inc. v. McDonalds Corp.,* 562 F.2d 1157, 1170 (9th Cir. 1977);

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[15] *Toksvig* itself evidently involved a copying of "expression;" it held that "if plaintiff has established that the passages in question *were original with her,* then their appropriation constituted infringement." 181 F.2d at 667 (emphasis added). It may be noted that in the twenty-three years since *Eisenschiml, supra,* which distinguished *Toksvig* and held for a defendant who admitted using plaintiff's historical ideas and "themes," *Toksvig* has not been cited once by the Court of Appeals in its own Circuit. It has been cited only three times by other Courts of Appeals: in *McDonalds Corp., supra;* in *Public Affairs Assocs., Inc. v. Rickover,* 284 F.2d 262, 272 n.34 (D.C. Cir. 1960), *vac. and rem.,* 369 U.S. 111 (1962) (on "fair use"); and in *Rosemont Enterprises, Inc. v. Random House, Inc.,* 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967), where the Second Circuit, reading *Toksvig* expansively, nevertheless refused to "subscribe to the view that an author is absolutely precluded from saving time and effort by . . . relying upon prior published material."

see also *Midas Productions, Inc. v. Baer*, 437 F.Supp. 1388, 1389-90 (C.D. Cal. 1977), and the oft-cited decision of Judge Yankwich in *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F.Supp. 632, 638 (S.D. Cal. 1935).

II.

COMMON-LAW PROTECTION CANNOT BE CONFERRED UPON MATERIAL WHICH THE COPYRIGHT LAWS PLACE IN THE PUBLIC DOMAIN.

In *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964), this Court held:

> "Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection *of a kind that clashes with the objectives of the federal patent laws.*" [Emphasis added.]

In *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964), the Court explained the point further:

> "Today we have held in *Sears* . . ., that when an article is unprotected by a patent *or a copyright*, state law may not forbid others to copy that article. To forbid copying would interfere with *the federal policy*, found in Art. I, § 8, cl. 8, of the Constitution . . ., *of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.*" [Emphasis added.]

Here it has long been settled, as a matter of affirmative federal policy under the copyright laws, that historical facts, theories, and ideas are in the public domain, free for all to use. See pages 11-19, *supra*.

To permit an author to bar others from using the historical facts, inferences, and theories about which he

wrote—which is what petitioner seeks to do here[16]—would be directly contrary to the purposes of copyright protection. *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F.Supp. 632, 638 (S.D. Cal. 1935); *Midas Productions, Inc. v. Baer*, 437 F.Supp. 1388, 1390-91 (C.D. Cal. 1977); see pages 11-12, *supra*. It would promote not "the Progress of . . . useful Arts," Constitution, Art. I, § 8, cl. 8, but wasteful duplication of effort, since each author would have to begin anew, unable to build upon the work of his predecessors. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 309-10 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

As the courts below held, App. A-16, A-22, this Court's *Sears* and *Compco* decisions plainly preclude protection, through the "back door" of an unjust enrichment claim, of the historical facts, theories, and ideas which settled federal policy has long held to be in the public domain. Petitioner's reliance on *Goldstein v. California*, 412 U.S. 546 (1972), is misplaced.[17] *Goldstein* reaffirmed *Sears* and *Compco*. It merely held that the states were not precluded from protection *where no "federal policy" could be found* (412 U.S. at 571):

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[16] Petitioner made this quite clear below. See, *e.g.*, JA 819: "Q. . . . If there is a fact in your book and the same fact in Mr. Mooney's book, even though there is a common source for that, you say that's a taking of literary expression? A. I answered you, yes. Q. Okay, Mr. Hoehling, if Mr. Mooney reads a fact in your book and goes on to expand that fact by independent research, do you claim that violates your rights? A. Yes."

[17] Petitioner also cites *International News Service v. Associated Press*, 248 U.S. 215 (1918), which is in no way apposite here. That case dealt with competing news organizations' rights in "hot news," as did the portion of the House Report quoted at *Petition*, p. 43. The settled principles on which this case turns were not involved.

> ". . . [W]e have concluded that our decisions in *Sears* and *Compco*, which we reaffirm today, have no application in the present case, since *Congress has indicated neither that it wishes to protect, nor to free from protection,* recordings . . . fixed prior to February 15, 1972." [Emphasis added.]

That is not this case. Here there *is* a settled federal policy, established for over half a century and recently reaffirmed by Congress (see pages 11-12, *supra*), placing historical facts, ideas, and theories in the public domain. No more need be said.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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